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Brief of Bliss & Phelps for P. E.

Filed January 9, 1894.

United States Supreme Court.

OCTOBER TERM, 1896.

Office Supreme Court
FILED
JAN 9 1897
JAMES H. McKENNE

EDWARD HODGSON
plaintiff in error,

vs.

THE STATE OF VERMONT.

BRIEF FOR THE PLAINTIFF IN ERROR.

W. H. BLISS and
E. J. PHELPS,
Counsel.

Free Press Association, Printers, Burlington, Vt.

Supreme Court of the United States.

OCTOBER TERM, 1896.

EDWARD HODGSON,

plaintiff in error,

vs.

THE STATE OF VERMONT.

In Error to the Supreme Court of Vermont.

Brief for the plaintiff in error.

STATEMENT.

At the June term, 1892, of the County Court for the County of Addison in the State of Vermont, the plaintiff in error was tried and convicted "of one first offence and one second offence," upon an information for selling liquor, filed by the State's Attorney. The information was as follows: (*Record, p. 3.*)

STATE OF VERMONT, }
County of Addison. } ss.

Addison County Court at their June term, begun and holden at Middlebury on the first Tuesday of June, A. D. 1892, within and for the County of Addison.

Be it remembered that Frank L. Fish, State's Attorney within and for said county, comes here into open court in his own proper person, and upon his oath of office gives said court to understand and be informed, that Edward Hodgson of Orwell in the county of Addison and State of Vermont, on the 7th day

of June, A. D., 1892 at Orwell in the county of Addison aforesaid, did at divers times sell, furnish and give away intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

And the said State's Attorney, on his oath aforesaid, comes and gives said court further to understand and be informed, that the said Edward Hodgson, prior to this time, to wit, at the December term of the county court held at Middlebury in and for the county of Addison, on the first Tuesday of December, A. D. 1891, before and by consideration of said court, was, as appears of record, convicted of selling, furnishing and giving away intoxicating liquors, against the law in such case made and provided.

FRANK L. FISH,
State's Attorney.

It is stated in the record that the State's Attorney "likewise filed specifications in words and figures following :"

STATE vs. HODGSON.

In said case the State's Attorney, for a specification, specifies, and says as follows: That he will rely upon, and expect to prove in the trial of said cause, the fact that the respondent, within three years before the filing of the information in the said cause, sold, furnished and gave away intoxicating liquor to the following named persons, or to some one of them, that is to say :

[Here follow the names of sixty-six persons, whose residence is not given.]

" And the undersigned State's Attorney states that he has also specified the offences against said respondent with all the certainty as to the time and person, and he is now able from all the information he has in said cause ; and the State's Attorney reserves the right to amend these specifications if he shall have further evidence pursuant to the statute.

And the State's Attorney further specifies and relies upon the selling furnishing and giving away of intoxicating liquor by the

respondent within three years before the filing of said information, to some person or persons now unknown to the State's Attorney, and claims the right to add the names of such persons, when ascertained, to the specifications, and to make such other amendments in these specifications as the law and the discretion of the court may admit.

(*Record p. 3-4.*) FRANK L. FISH,
State's Attorney."

This specification is not required by any statute, and forms no part of the information. It is, however, provided by statute that "*when* a specification is *required*, it shall be sufficient to specify the offences with such certainty as to time and person as the prosecutor may be able, and the same shall be subject to amendment at any stage of the trial; and where the specification sets forth the sale, furnishing or giving away to any person or persons unknown, the witnesses produced may be enquired of as to such transactions with any person, whether named in the specification or not, and as the name of such person may be disclosed by the evidence it may be inserted in or added to the specification upon such terms as to a postponement of the trial for this cause, as the court shall think reasonable." (*Stat. of Vt. 1886 No. 37.*)

It does not appear from the record that the specification was asked for by the respondent, nor whether the offences of which he was convicted were for selling, furnishing, or giving away; or whether to either of the sixty-six persons named in the specification, or to some person or persons not named. These proceedings were based upon sections 3802, 3803, 3859 and 3860 of the Revised Laws of Vermont, (Revision of 1880:) as amended by No. 42 of the Acts of 1888, which are as follows:

SEC. 3802. If a person by himself, clerk, servant or agent, sells, furnishes or gives away, or owns, keeps or possesses with intent to sell, furnish or give away intoxicating liquor or cider, in violation of law, he shall forfeit for each offence to the State, upon the first conviction not less than five nor more than one hundred dollars, and may also be imprisoned in the discretion of the court, not more than thirty days; upon the second and

each subsequent conviction, not less than ten nor more than two hundred dollars for each offence, and shall also be imprisoned not less than one month nor more than one year.

SEC. 3803. Justices shall have concurrent jurisdiction with the county court in prosecutions under the preceding section, and the same may be tried upon the complaint of a grand juror of the town, or of the State's Attorney, before a justice, or upon the information of the State's Attorney, before the county court.

SEC. 3859. Complaints for any offence against Section 3572, (Section 3802), shall be substantially in the following form:

STATE OF VERMONT, }
———COUNTY, SS. } To A. B., justice of the peace for the county of———, comes C. D., grand juror of the town of ———, in said county, and complains that E. F., of———, on the———day of———, A. D.———, at———, did at divers times, sell, furnish or give away (as the case may be), intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

C. D., *Grand Juror*.

SEC. 3860. Under the foregoing complaint every distinct act of selling, furnishing or giving away may be proved, and the court shall impose a fine for each offence.

Before trial the plaintiff in error filed a motion to quash the indictment. (*Record p. 4-5.*) This motion was overruled by the court, to which decision the plaintiff in error duly excepted. The case was carried by the plaintiff in error to the Supreme Court of Vermont upon exceptions to the overruling by the County Court of his motion to quash, and upon other exceptions taken at the trial, and not material here, as they raise no federal question. Judgment and sentence having been stayed in the County Court, to await the result of the hearing in the Supreme Court. (*Record, p. 3, Fol. 10.*)

In that Court the plaintiff in error filed a motion in arrest of judgment, which he was allowed by the Court to do, and the

same was taken into consideration and passed upon by the Court.

The motion in arrest will be found in the record, pp. 6-7-8. The grounds set forth are in substance: that the information upon which the conviction was had is insufficient and void, and lacking in substance in various particulars specified in the motion; that the respondent was deprived of his right to be informed of the nature and cause of the accusation against him; that he was convicted of two infamous crimes without due process of law; and denied by the State the equal protection of the law; that the statutes of Vermont under which the proceedings were had are in conflict with the provisions of the Constitution of the United States and especially that provision of the fourteenth amendment which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person the equal protection of the law."

The Supreme Court of Vermont affirmed the judgment of the County Court refusing to quash the information, and overruled the motion in arrest. And proceeded to render judgment upon the verdict, and sentenced the plaintiff in error to pay a fine of $30 for the first offence and $70 for the second offence, with costs taxed at $197.36, and to be confined at hard labour in the House of Correction at Rutland for the period of 60 days, "with alternative sentence." (*Record p. 19.*) The alternative sentence is, that in case of failure to pay the fine and costs within twenty-four hours, the respondent be confined in the House of Correction for the term of three days for each dollar, in addition to the period for which he is sentenced. (*Rev. Laws Sec. 4336.*)

The reasons for this decision and judgment will be found in the opinion of Ch. Jus. Ross. (*Record, pp. 8-19.*) The case is reported in the *66 Vermont Rep. p. 134.* The Court decided in substance that the information was sufficient; that it constituted due process of law: that the statutes in question and the pro-

ceedings under them did not infringe any provision of the Constitution of the United States. The right claimed by the plaintiff in error under the Constitution, and his sole ground of defence in the Supreme Court of Vermont, was therefore denied.

To reverse that judgment is the object of this writ of error. The assignments of error upon which the petition for the writ was based, will be found in the *Record, pp. 20-23*, and cover all the points above mentioned. And further assignments of error were filed in this Court to the same effect. (*Record, p. 26.*)

POINTS.

I. The conviction of the plaintiff in error, and his sentence to fine and imprisonment at hard labour, were without "due process of law," and were therefore in contravention of the provisions of the fourteenth amendment to the Constitution of the United States.

1. The offences of which he was found guilty are made infamous offences by the statutes of Vermont, because they are made punishable by confinement at hard labour, in the House of Correction.

In *Ex parte Wilson 114 U. S. Rep. 417*, it was held that any crime, punishable by imprisonment at hard labour, is an infamous crime.

In the case of *Mackin vs U. S. 117 U. S. Rep. 348*, the court says: "We cannot doubt that, at the present day, imprisonment in a State Prison or penitentiary, with or without hard labour, is an infamous punishment. It is not only so recognized in the general opinion of the people, but it has been recognized as such in the legislation of the states and territories, as well as by Congress."

To the same effect are:

In Re Medley, 134 U. S. 160.
In Re Clauson, 140 U. S. 200.
Rosen v. U. S. 161 U. S. 440.
Op. of Mr. Jus. White.

The statute (before quoted) under which these prosecutions take place, requires only imprisonment, without specifying that it shall be at hard labour. But the Revised Laws (1880), then in force (*sec. 4365*) provide as follows :

"Where an offence is declared by law to be punishable by imprisonment, and it is not specified that such imprisonment shall be in the state prison, it shall be considered to mean imprisonment in the House of Correction, if the offender is over sixteen years of age, if a man, or fifteen if a woman, at the time of conviction."

And sec. 4378 provides that :

"Persons sentenced to imprisonment in the House of Correction shall be kept at hard labour therein during such imprisonment."

2. In such cases, and in all prosecutions for crime in courts of record, due process of law requires an indictment, or at the least an information. It has never been held or claimed in any court that this may be dispensed with.

3. It is equally well settled that due process of law requires that the indictment or the information, (which is subject to precisely the same rules,) should contain a specific and certain description of the precise offence charged, sufficient to enable the respondent to know what he is to meet, and to prepare his defence : sufficient to prevent his being indicted for one offence and tried for another ; and to make the record, whether upon conviction or acquittal, a bar to another prosecution upon the same charge. Short of this it would not be an indictment.

That this was the requirement of the common law of England as adopted in this country, and as ever since maintained in Great Britain, will not be denied.

1 Arch. Cr. Pl. and Prac. 291.

It is likewise fully established as American law, and as a necessary feature in due process of law within the meaning of these words in the Constitution of the United States.

Says Judge Cooley, (*Cons. Lim. 327, 6th Ed.*) "The Legislature have no power to dispense with such allegations in indictments as are essential to reasonable particularity and certainty in the description of the offence." And again (p. 374) "The accusation, whether by indictment or information, must be sufficiently specific fairly to apprise the respondent of the nature of the charge against him, so that he may know what he is to answer, and so that the record may show, as far as may be, for what he is put in jeopardy."

Says Judge Story, (*Com. on Constitution, Sec. 1779,*) "The indictment must charge the time and place and nature and circumstances of the offence, with clearness and certainty, so that the party may have full notice of the charge, and be able to make his defence with all reasonable knowledge and ability."

Says Mr. Justice Harlan, speaking for this Court, in the case of *Rosen v U. S. 161 U. S. Rep. 407*, "The doctrine to be deduced from the American cases is, that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist at the outset by demurrer or motion to quash, and after verdict by motion in arrest of judgment, that the indictment shall apprise him of the crime charged, with such reasonable certainty that he can make his defence, and protect himself after judgment against another prosecution for the same offence."

In Evans v. U. S. 153 U. S. Rep. 587. This Court, through Mr. Justice Brown, says: "The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. * * * Even in the case of misdemeanors the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offence intended to be charged, not only that the former may know what he is called upon to meet, but that upon a plea of former acquittal or conviction the record may show with accuracy the exact offence to which the plea relates."

Mr. Justice Field in delivering the opinion of this Court in *U. S. v. Hess, 124 U. S. Rep. 485*, says: "The general, and

with few exceptions, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offence must be stated. The doctrine invoked by the Solicitor General that it is sufficient in an indictment upon a statute to set forth the offence in the words of the statute, does not reach the difficulty. Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied by such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.

In the *State v. Leonard, 47 Maine*, the court says: "But in criminal prosecutions, the exercise of this right" (the regulation of process) "is limited and controlled by the paramount law in the constitution. It has for centuries, since the declaration in Magna Charta, been the boast of the common law that it protects with jealous care the rights of the accused. It not only secures a speedy and impartial trial by jury, but it requires that no person shall be held to answer until the accusation against him is formally, fully and precisely set forth, that he may know of what he is accused, and be prepared to meet the exact charge against him. This right of the respondent has ever been regarded as sacred and essential to the protection of the individual citizen. In all the changes of the forms, and in the principles and practice of the law, this right has remained untouched and unchanged. The people have not been willing to leave it without the express sanction of the constitution."

Says Chief Justice Gibson in *Hartmann v. Commonwealth, 5 Penn. St. 60, 66*: "Precision in the description of the offence is of the last importance to the innocent; for it is that which marks the limits of the accusation and fixes the proof of it. It is the only hold he has on the jurors, judges as they are of the fact and the law."

See also to the same effect:

U. S. v. Mills, 7 Pet. 291; U. S. v. Cook, 17 Wal. 174; U. S. v. Cruikshank, 92 U. S. 523.

Also *Com. vs. Thurber, 41 Mass. (24 Pick. 374.) Whitney vs. State, 10 Ind. 404 ; McLaughlin vs. State, 45 ib. 338 ; State vs. McKinstry, 50 ib. 465 ; Sandringham vs. State, 49 ib. 186 ; Scudder vs. State, 62 ib. 43 ; Miller vs. State, 79 ib. ; State vs. Doyle, 11 R. I. 574 ; McKenna vs State, 17 All. (R. I. 51) ; Saco vs. Wentworth, 37 Maine ; Murphy vs. State, 24 Miss. 590 ; and 28 Miss. 637 ; Capritz vs. Maryland, 1 Md. 569 ; Darwin vs. State, 34 Ala. 216 ; Bryan vs. State, 45 ib. 86 ; State vs. Faucett, 4 Dev. & Bat. (N. C.) 107 ; State vs. Cox, 29 Mo. 475 ; State vs. O'Flaherty, 7 Nev. 153 ; Bishop on Stat. Cr. sec. 1036 ; Williams vs. State, 12 Texas App. 395 ; Brown vs. People, 29 Mich. 232 ; People vs. Olmstead, 30 ib. 431.*

4. Tested by these just and unquestionable rules, the information in the present case utterly fails, in the most important and substantive particulars, to meet their requirements.

(*a.*) It does not charge any specific offence whatever.

The offences created by the statute on which the prosecution is founded are not a continuous course of dealing, nor the becoming a dealer, nor is any such charge made. They are specific sales to individual purchasers, each of which is a separate crime, to which a separate penalty attaches.

These offences may consist either in "selling, furnishing, or giving away." Each of these is a transaction different from the others, and to be established by different proof. Which of them is intended to be charged, in the present case, the information does not disclose.

It is held in Vermont that these offences are different, and that a conviction for one can not be had on an indictment charging another.

State v Freeman 27 Vt. Rep. 523.

Even the statute of Vermont requires the offences to be discriminated in the complaint. (*See statute form supra.*)

Suppose that a statute should provide that if any man should commit an assault with intent to kill, or to commit rape,

or to commit mayhem, he should be punished by a certain term of imprisonment. And that in such case two or more offences might be joined in the same indictment and in the same count. Would it be contended that an indictment could be sustained as due process of law which charged a respondent with committing assaults with all these intents upon divers persons at divers times, without further specification? And that the respondent might be convicted under it of "two offences," not specifying which or what?

While it may be true that, contrary to the rule of the common law, more than one offence may be charged in a single count without violating the requirements of due process of law, it is not true that an indictment can be so framed as to charge an indefinite and unlimited number of offences. No known rule of law allows that, and common justice to the respondent, and a decent regard to the proprieties of judicial proceeding forbid it.

The objection is not that more than one offence is charged. It is that no offence that can possibly be proved is excluded. The conviction may be for one crime or for a thousand.

(b.) No attempt is made in the information to state with any reasonable certainty the time when the offences charged or any or either of them occurred. The averment is that the respondent, on the 7th day of June, 1892, did, *at divers times*, sell, furnish, and give away intoxicating liquor. The term at which the information was filed, is stated therein to have begun on the first Tuesday of June, which could not have been later than the 7th. In the "specification" filed by the State's Attorney on the 24th day of June, (the effect of which will be considered hereafter,) it is set forth that the attorney "will rely upon and expect to prove the fact that the respondent, *within three years* before the filing of the information in the said cause, sold, furnished, and gave away, to the following named persons, or to some one, or more of them," naming sixty-six persons. And further specifies and relies upon the selling, furnishing, and giving away, &c., "within three years before the filing of information, to some person or persons now

unknown to the State's Attorney, and claims the right to add the names of such persons when ascertained."

It is said that time in an indictment is not material. That is true upon a question of variance, when the crime turns out to have been committed on a different day from that named. But the reasonable attempt at such an averment of the date as is fairly necessary to certainty of description, is a very different thing, and has never been dispensed with. It is apparent on the face of these proceedings, that so far from any attempt being made to give the respondent notice of the approximate times within a period of three years, when were committed any of the numerous offences attempted to be relied on, or of the innumerable offences expected to be relied on so far as they might be discovered, any such embarrassment to the prosecution was sedulously and successfully avoided.

(c). The name of no person to whom liquor was alleged to be sold, furnished or given away is stated in the information. This is an element of description of the offence that is indispensable, because in an information of this character no other sufficient description of the offence is possible.

It has been often decided, and by courts of high authority, that in indictments or informations for selling liquor, it is necessary, in order to comply with the constitutional requirements, to give the names of the persons to whom the sales are charged to have been made, because in no other way can the offences charged be sufficiently described or identified.

In *Com. v. Thurber, 24. Pick. 374, per Ch. Jus. Shaw*, it was held that when the indictment is for doing a specific act of liquor selling, it "must charge the doing of that act with the usual precision and certainty requisite in other cases," and that the name of the purchaser must be given.

In *State v. Doyle, 11 R. I. 574*, where in a similar case a respondent was indicted for selling, without stating to whom, Ch. Jus. Durfee in delivering the opinion of the court, after stating

the general rule as to the certainty required in an indictment, and the reasons on which it rests, says, "It is evident that this right has not been duly respected in the complaint before us. The offence charged is not so identified as to give the defendant certain information of what in particular she was accused, so that she may have been indicted for one offence when she was accused of another totally distinct from it. Her right to be informed of the nature and cause of the accusation is a constitutional as well as a common law right, and ought to be carefully guarded and maintained. It is true that even naming the purchaser is not always a perfect mode of identification, but it is the approved mode, and is perhaps as perfect as any that can be devised." After adverting to the practice that had long prevailed to draw complaints in the form of that before the court, he said, "we do not see how upon either principle or precedent the practice can be upheld."

In *McLaughlin v. the State, 45 Ind. 338*, where the statute of the state provided that in prosecutions under the liquor law it should not be necessary to state the name of the person to whom sold, the court held the statute unconstitutional, and through Ch Jus. Downey said, "It is little less than mockery to furnish the defendant with a copy of such an accusation. * * * The legislature has not the power to dispense with such allegations in an indictment, as are essential to reasonable particularity and certainty in the description of the offence."

To the same effect are *State v. Cox, 29 Missouri 475. Darwin v. State, 34 Ala. 216, State v. Fawcett 4 Dev. and Battle (N. C.) 107, Endens v. People (per Campbell J.), 20 Mich. 233.*

And the constitutional requirement in indictments is so stated in *1 Bishop's Crim. Pro., Sec. 107-108.*

In U. S. v. Simmons, 96 U. S. Rep. 360, it was held that an indictment that charged the respondent with causing or procuring some other person to use a still for the purpose of distilling, is bad on motion in arrest, unless it states the name of such other person or avers that the same is unknown.

In the case of *Rosen v. U. S. 161 U. S. Rep 407*, which was an indictment for sending obscene matter, it was held that re-

citing the matter in question in the indictment might be dispensed with, solely on the ground of the exception to the general rule which excuses from defiling the records of the Court with indecent matter, if the paper in question is otherwise sufficiently identified, (as in the opinion of the majority of the court it was,) to give the accused proper information of the charge against him, and to protect his rights. But even in that case two of the learned judges dissented, on the ground that without reciting the paper such information and protection were not by the remainder of the indictment sufficiently afforded.

What would have been said to that indictment if it had merely charged the respondent with sending divers obscene matters to divers persons unnamed and unnumbered, at times not stated, within three years before the indictment was found?

See also, *U. S. v. Cruikshank, 92 U. S. Rep. 542.*

In the case of *O'Neil v. Vermont 144 U. S. 324*, a similar question was attempted to be raised, but it was held by the majority of the Court that it was not raised, and the writ of error was therefore dismissed without considering the question.

But Mr. Justice Field, who, with two of his learned associates, dissented from the opinion of the majority of the Court on that point, used this language in respect to the question now under discussion:

"The complaint against the accused describes, as I have said, only a single offence, that of selling, furnishing and giving away intoxicating liquor without authority. It designates no person or persons to whom such liquor was sold, furnished or given away, nor specifies any number of offences, but charges that the offence named was committed at 'divers times.' And yet he was tried and convicted under this complaint of three hundred and seven distinct offences, and punishment was imposed for each one. * * * * Due process of law required a specific description of all the offences for which the defendant was to be put on trial. Proceeding without it was not due process of law; and in my judgment, no legislation of Vermont could make it so. * * * * * * *

"It is the established rule of law which has prevailed in England and in this country since the revolution of 1688, if not for a period anterior to it, that in all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him. It is the law of every civilized community, and *in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed.* The information which he is to receive is that which will acquaint him with the essential particulars of the offence, so that he may appear in court prepared to meet every feature of the accusation against him." Quoting with approval the language of Ch. J. W. Gibson, *supra.*

From this language no member of the Court expressed dissent. The only point decided by the majority was that the federal question was not raised.

It is of course not meant to be asserted that in a case where a specific offence is charged and sufficiently described, but the name of the party upon whom it is committed can not be ascertained, an indictment can not be framed. Doubtless a man might be indicted for murder and convicted, though the name of the victim was unknown, if the offence was otherwise sufficiently described.

The objection is to an indictment that describes in no way any specific offence, but charges in general terms an indefinite and unlimited number of offences not specified, described or identified in any particular and not attempted or intended to be.

d. No attempt whatever is made in the information to supply in any other way the want of description of the offences charged. Neither the place (within the town of Orwell) where the sales, furnishings or giving away are claimed to have taken place, the kind or quantity of "intoxicating liquor" so disposed of, or any other circumstance that would tend to identify the transactions referred to, or to show which of the three offences

was intended to be alleged, or the time, within three years, of their supposed commission, is stated in the information.

It is not contended that the absence of these minor particulars in an information otherwise containing a sufficient description of the specific offences, would be fatal to it. But only to point out that no other attempt at description in any way whatever, is made.

5. The information is not aided in any respect by the "specification" filed.

(*a*) That forms no part of the information, and, whatever it contained, would not supply either the want of an information, nor, what is the same thing, defects in it which render it void under the constitutional requirement. It will not be contended that it would be the subject of a motion to quash, a demurrer, a plea, or a motion in arrest. Nor that any such pleas or motions could be addressed to the information, predicated upon the contents of the specification.

(*b.*) Nor is it a part of the record. As will be pointed out hereafter, it is a document to be "furnished," if at all, *to the respondent.*

Bishop's Crim. Procedure, Sec. 643-646, last ed.

(*c*) It is not required by any statute, nor is it a matter of right. It is furnished under a practice that has grown up in consequence of an *obiter* intimation of the Supreme Court of Vermont, in the case of *State v. Conlin, 27 Vt. Rep. 318*, where it was first suggested. The Court say:

"It was held by the Court in *State v. Parker*, and we think correctly, that under one complaint the prosecution might show any number of offences, being bound, *if required, to give the respondent* before trial a specification of the nature of the offences which he would attempt to prove." But in *State v. Parker*, which is reported in *26 Vt. Rep. 357*, not a word is said about a specification, nor does it appear that there was one,

or that any question respecting the right to one arose. It was held in that case that a man was properly convicted of four offences charged in one count under the Act of 1852. In *State v. Bacon, 41 Vt. Rep.* 526. it was held that the right to a specification arose under the decision of the court in *State v. Conlin*, but that it was a matter of discretion with the court "to be exercised with reference to the circumstances of the case," and in that case a very loose and imperfect specification was held sufficient. In *State v. Davis, 52 Vt. Rep. 376*, the specification charged "the selling, furnishing and giving away intoxicating liquor, five different and distinct times, on each and every successive day of each and every successive month of 1876, 1877, and 1878, to each and every person whose name was appended," concluding with a long list of names. The respondent objected to this specification, but his objection was overruled. After conviction he carried the case to the Supreme Court on an exception to this decision. That Court commented severely upon the character of the specification, describing it as "mere shunnage," not designed to inform the respondent of the offences intended to be proved, but to prevent him from being informed. But held that the specification was not a matter of right, but only an application to the discretion of the court, and that the decision upon it could not be reviewed in the appellate court. The case of *State v Woolley, 59 Vt. Rep. 337*, is to the same effect.

After the decision of the Supreme Court of Vermont authorizing a specification to be furnished to the respondent, the Legislature intervened by the passage of the Act of 1886, quoted in full *supra* p. 3, which provides in substance that *when* a specification is "*required*", it shall be sufficient to specify with such certainty as the prosecutor "*may be able*;" that it may be amended at any stage of the trial: that witnesses may be enquired of as to the sale, furnishing, or giving away, to any person, *whether named in the specification or not, and that the name of such person may be inserted in the specification.*

While ostensibly following therefore, the intimation of the Supreme Court in *State v Conlin*, in allowing a specification, both Court and Legislature have united in denying that there is any

right to it, and in authorizing it to be framed, when given, in such a manner as to be of no use whatever to the respondent.

(*d.*) But if it were possible that the specification could be attached to the information as a part of it, or as a substitute for it. the objection is increased and intensified, because the information would be made worse instead of better.

The information charges sales to "divers persons" on the 7th day of June, and "on divers days." The specification, while giving the names of sixty-six persons whose residence is not given,—perhaps because they had no residence,—extends the charge to divers other persons unknown, to whom sales, &c., were made within three years next before the information, whose names the prosecution reserves the right to include in the information when discovered, with other amendments.

The specification is therefore much broader, and even less specific than the information, and enlarges instead of restricting it.

6. The respondent can not plead to such an information intelligently, but must necessarily plead not guilty.

He might desire to plead guilty to some or all the charges, if he knew what they were, and thus save the expense of a trial, and entitle himself to consideration in mitigation of punishment. This is his right, even though guilty. He might wish to plead a former conviction or acquital. It appears from the record that he had been previously prosecuted. He might wish to plead a pardon. All these pleas would be equally impossible to be addressed to such an information.

In the case of *Hapt v. Utah*, *110 U. S. Rep. 579*, a judgment of conviction was reversed by this Court, because *the record did not show* that the respondent had been put to plead, though tried and found guilty, and though he had made no objection on that score. If this right is so important to the accused that it can not even be waived by his own consent, nor presumed to have been accorded until the contrary is asserted, how

much more important is it that the indictment should be so framed as to admit of a plea.

7. Nor does such an information protect the respondent in the least against being prosecuted for one crime and convicted of another.

What supposed offences were originally the foundation of the prosecution can only be known to the State's Attorney. Whether the conviction was for either of them or for some subsequently discovered offence, can never be known.

Yet, as has been seen, such protection is not only demanded by common justice, but has always been held to be one of the cardinal requirements in an indictment.

8. Under this information it is, and must remain, utterly uncertain what particular two offences the respondent was convicted of. Whether the jury all agreed as to any two specific offences, either of selling, furnishing or giving away, or whether each of the jury was satisfied in respect to two different offences of one kind or the other, and so concurred in the general verdict, without any agreement as to any one offence of either kind, can not be known.

Such a conviction cannot be regarded as due process of law.

9. The record of an acquittal or conviction upon such an information, forms no bar to a second prosecution for the same offence. A requirement in an indictment which has been before shown by the repeated declarations of this Court, not only to be indispensable but to have been universally so held.

The only authority to the contrary is to be fonnd in the suggestion of the Supreme Court of Vermont, in the opinion in this case, that this objection is without foundation, because the former conviction or acquittal *may be established by parol evidence.* (*Record p. 16.*) That is to say that, under an information admitting of proof of an indefinite number of offences by selling, furnishing or giving away to persons unnamed, and at times not

stated, when forty or fifty witnesses are called, as in this case, in reference to as many different charges, and the respondent is found guilty" of one first offence and one second offence, (*Record, p. 5*) the respondent, if prosecuted again, will be expected to show by parol not only what the evidence was on the trial, but what offences were in the minds of the jury in returning the verdict. It is by the record that a plea of former conviction or acquittal must be established. And it is the plain right of the accused to have a record that affords him this protection.

It might perhaps be suggested that the conviction on such an information may be held a bar as to all prior offences. But the Statutes of Vermont provides expressly to the contrary. (*Rev. Laws. Sec. 3807.*)

10. This information must be judged by the same rules that apply to all other indictments and informations in courts of record, especially to those which charge infamous crimes.

Such is the view of them held by the courts of Vermont. In *State v. Haley, 52 Vt. Rep. 476*, it is said of them: "This class of statutory crimes stands for the same consideration and is subject to the same rules of law as any other crimes." And in *State v Davis, 52 Vt. Rep. 376*: "This class of cases is no exception to the generality of criminal cases."

In respect to the protection afforded by the constitution to the accused it is impossible to state any distinction between this and other infamous crimes. And if any could be found, it would be in favor of a stricter protection in cases like this. For there is no crime known to the laws of Vermont, in punishment of which such enormous fines and protracted imprisonment are imposed, as in these. True, this is by what is called a repetition of "second offences." But if a man having been once convicted, sells to or treats a dozen persons at once, all the instances are second offences. And if he becomes a dealer for three days, and sells to a hundred persons in that time, he commits so many second offences.

What would be said to an indictment that charged a respondent with divers murders or robberies upon persons not named, within three years next preceding, with not a word from which the particular crime or crimes referred to could be inferred, and this under a statute which authorized proof under such an information of an unlimited number of offences, whether those originally intended or others afterwards discovered. And what would be said of a conviction under such a proceeding, of "two offences," out of many attempted to be proved, without specifying, or leaving it possible to discover, what offence, or upon whom ?

It is said to be desirable to suppress the traffic in intoxicating drinks. But not more desirable in the estimation of rational men than the repression of murder, rape and other felonies. Neither can be accomplished by a disregard of constitutional safeguards, and the established proprieties of judicial procedure. If the sale of liquor is elevated by legislation into an infamous crime, those charged with it become entitled to the same constitutional protection that is accorded to the persons accused of other infamous crimes. And due process of law will be found in all cases much more effectual for the punishment of guilt, as well as for the protection of innocence, than the blind efforts of a frantic fanaticism, which under pretended forms of law violates its fundamental principles.

11. The information and the statutes on which it is founded, should be considered in connection with other provisions of the same law applicable to the case.

By the statute in force when this prosecution took place, *Laws of Vermont, 1886, No. 41*, one-fourth of all the fines and penalties *mentioned* in the sections providing for fees and penalties, go, upon conviction, to the complainant, when complaint is made, *otherwise to the prosecuting officer*. And for every *conviction* of a second offence obtained, the prosecuting officer receives the sum of *fifty dollars*. And in case bail is forfeited by the respondent in such prosecutions, *twenty dollars* of the for-

feited bail goes to the same officer. These allowances are in addition to his regular compensation, and are only given in *case of conviction*, or of the forfeiture of bail.

The officer therefore in whose sole discretion it is to institute this prosecution by filing the information, and to include under it on the trial such and so many charges of crime as he thinks proper, without previous notice to the accused, is placed under a direct and heavy bribe contingent on conviction, and increasing to an unlimited extent in proportion to the number of offences embraced in it.

We deny that a conviction thus obtained is upon due process of law. For it contravenes the fundamental principles of justice and law upon which all judicial proceedings repose.

The question whether a man shall be put on his trial for an infamous offence, is a judicial question, and a very grave one. The sole function of the grand jury, sitting as a judicial body, is to determine it. Could a conviction be deemed to be founded on due process of law, if each member of that body was stimulated by a fee of fifty dollars to be paid on conviction, together with a share of the fines imposed? And could a law providing for such payments be held constitutional as against the convicted respondent? As well might the judge and the jury who try the cause have a similar interest in the result.

The State's Attorney, if allowed to proceed against a respondent by information founded upon his oath of office, takes the place of the grand jury, and so far acts judicially. He can no more therefore, have a direct interest in the result than they can, without vitiating the proceedings.

And though not the judge on the trial, he is, in the prosecution, an officer of the Court and the representative of the State. It is not the purpose of the State nor the object of the prosecution to obtain convictions whenever possible, but to do justice; to see as well that they are not convicted who are not proved to be guilty, as to condemn those who are. And it is fatally inconsistent with the just attitude of a prosecuting officer that he should have a large and perhaps an enormous pecuniary interest in

putting a man to trial, obtaining a conviction, and the largest conviction possible.

The prosecution of all criminal cases has from time out of mind been entrusted in all courts under the common law to public prosecuting officers and to counsel solely representing the State. Counsel for private or interested parties are not allowed to intervene. The reason is that the prosecutor—like the judge, the jury and the grand jury—must have no interest inconsistent with an attitude of just impartiality of conduct.

If this feature in the law under which the plaintiff in error was convicted stood alone and afforded the only objection to the proceedings, we should respectfully submit that the judgment could not stand.

But it does not stand alone. It is to be taken in connection with and as a part of the statutes in question, all of which conduce to and have effect in the result complained of. The question of the sufficiency of this information as a substitute for an indictment is to be considered in the light of the further question, in whom and under what inducements to do injustice to the respondent is this discretion to disregard settled rules of precedure to be reposed. The question is, whether such an information, so obtained, is due process of law.

12. This proceeding is not an information. It is a mere drag net or fishing bill, such as is not tolerated even in civil litigation. It is well compared by the learned judge who delivered the opinion in the record, to *the general counts in assumpsit*, an extraordinary analogy by which to determine the requisites of an indictment, and for which no previous authority is known to exist.

It is not intended to prosecute for any specific or known offence, but to afford an opportunity without any specific charge at all to call before a jury as many witnesses as it may be thought possible to obtain information from, and if upon examation of them any evidence tending to prove any offence of either of the three kinds is elicited, to go for conviction of all

the offences so discovered. Such is the obvious design of the statutes.

That was the character of the present case. The record discloses nothing about the evidence on the trial. But the specification contains the names of sixty-six persons. The amount of the costs ($197.36) shows that a large number of witnesses must have been summoned, since without witnesses the costs could not under the statutes of Vermont have exceeded, and probably fell short of, $50. And the allowance to witnesses is $1 per day. Out of all these, proof of only two offences was obtained. It is obvious therefore that the witnesses were summoned not to prove any known case, but for the purpose of ascertaining what information could be elicited that might tend toward establishing any case at all.

13. That a State may prescribe and regulate criminal process within its jurisdiction, is not denied, provided that in so doing it does not infringe the reqnirements of the constitution of the United States. That no action it can take, by legislature or court, or by both combined, can be allowed to violate those requirements, when thereby it results that any person is deprived of life, liberty on property without due process of law, or is deprived of the equal protection of the laws, requires neither argument nor authority to prove. Nor is it material by what agency that result is attained.

As remarked by this Court in *Ex parte Virginia*, *100 U. S. Rep. 347*:

"Whoever by virtue of public position under a State government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name of, and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning."

It is not claimed that the information in the present case violates the constitutional provision merely because it is

defective in the form or technical requisites usual in the criminal law, and is therefore open to demurrer. On such an objection the decision of the State court or the action of the State legislature would be final.

Such was the case and such the decision in *Caldwell vs. Texas, 137 U. S. 692*, where the Court by Ch. Jus. Fuller, states with great clearness the distinction between defects of form and those that are fundamental.

By due process of law in criminal proceedings is meant not only that they should be in accordance with those general "rules that govern society," but likewise with the fundamental principles of judicial procedure. There can be no principle of proceedure more fundamental in its importance, more necessary to the accused, or more firmly established in the law of the land, than that which in the language of the constitution entitles him "to be informed of the nature and cause of the accusation against him." What that clause means has long been settled by the decisions of this Court, which in giving authoritative construction to the constitution, become a part of it. And that definition, reposing as it does on three cardinal points vital to the rights of the accused, and indispensable to the impartiality and the decency of the administration of public justice, is the criterion by which, as we respectfully submit, the information in this case should be tested. Does it give to the respondent such fair and precise notice of the charge against him as to enable him to defend himself? Does it afford such an indentification of the offence on the record as protects him from being indicted for one crime and convicted for another. And does it make the record a bar to his being again put in jeopardy for the same charge, after having once been convicted or acquitted of it?

And to these may be added another enquiry: do the statutes on which it is based violate one of "the rules that govern society," by making the judicial authority whence the information emanated a judge in his own case.

That is the very illustration given by Judge Cooley, of a judicial proceeding that would infringe those principles, quoting from an eminent English Judge.

Cooley Cons. Lim. p. 411.

II. By the proceedings in this case the plaintiff in error was "deprived of the equal protection of the laws."

That takes place when any man or set or class of men is dealt with by a State in respect to life, liberty, or property, upon a different system of law from that which is applied by that State to men in general, in similar cases, or, in other words, the general law. This provision of the constitution requires, as said by Mr. Justice Field in *Barbier v. Connally, 113 U. S. 29*: "That equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights."

Those persons in Vermont who are accused of selling or giving away liquor are denied by these statutes the protection extended by the general laws of the state to all others accused of any crime known to the law. In no other case can such an information as is now under consideration be filed. In no other case can an indictment be found or an information filed by authority pecuniarily interested in conviction. In no other case can new offences be added during trial to those charged against the accused in the original proceeding, or a record made up on his conviction or acquittal that affords him no protection against being again prosecuted for the same offence.

Whatever penalties may be enacted against particular offences, different from or more severe than against other crimes equally or more heinous, the right of the accused to the protection of those methods of procedure necessary to justice, is equal in all cases. Even a man charged with giving his friend a glass of beer, is presumed to be innocent until he is legally proved guilty, and has the same right to a legal and fair trial under the general law as if he had committed a less serious offence. If deprived of that right, accorded by the law of his state to all who are accused of other crimes, on account of the nature of the offence of which he is accused; and in order to make his conviction more easy or more certain, it is not to be questioned that he is deprived of the equal protection of the

laws, within the meaning of the constitution. Such is precisely this case.

It is unnecessary to elaborate the argument on this point, since it is but another mode of stating the propositions already advanced in respect to due process of law.

III. The conviction of the plaintiff and his sentence to infamous punishment was without due process of law, because he was not indicted by a grand jury.

This objection was distinctly raised by the notice to quash. (*Record, p. 4.*)

In view of the decision of this Court, in *Hurtado v. California, 110 U. S. Rep. 516,* it is not proposed to enter into the extended argument on this point or the citation of authorities necessary to its proper discussion, for two reasons. We can not regard it as necessary to the reversal of the judgment to which this writ of error is directed. And we could add nothing to the argument of the powerful dissenting opinion in that case.

But should it be found necessary to the disposition of the cause to decide the question, we most respectfully insist that the decision in *Hurtado v. California* is erroneous.

The rule of *stare decisis* is a very important one, and is in a considerable class of cases decisive. But where the question concerned affects one of the most essential rights of an accused person under the constitution of the United States, in cases involving his liberty or his life, it can never be too late to ask for a reconsideration of it. Such a question can never be regarded as finally decided, until it is clear that it is decided right.

The authority to the contrary includes the great names of Kent, Story, Shaw, Curtis, Bronson and Cooley, as well as that of many courts and judges of lesser distinction. And it may well cast a doubt upon the decision even of this high court of the last resort.

It can never be successfully maintained, we respectfully contend, that any requirement in criminal procedure so essen-

tial to justice that the constitution includes it among the fundamental rights, does not form a necessary part of due process of law as intended by the constitution. Otherwise the constitution contradicts itself. If one may be dispensed with, all the other rights of an accused person enumerated in the fifth, sixth and eighth amendments may, each in turn, be dispensed with. For they all stand in that instrument on the same foundation, and are declared in the same language, in the same connection and for the same purpose. Indeed, every one of the rights secured by these amendments to the accused, has been taken away in liquor cases by the Statutes of Vermont, except the right to be confronted with the witnesses against him and to have the assistance of counsel.

It is a matter of familiar knowledge that the rights set forth in these amendments were originally omitted from the constitution because they were deemed to be such fundamental and undeniable rights under the common law, that they would be disparaged if thought necessary to be protected by express enactment. And when later it was perceived that they must be expressed in the constitution in order to prevent them from being destroyed by legislation, the amendments in which they were contained, only crystalized the principles of the common law that had prevailed ever since Magna Charta. But whether they were law before or not is now immaterial, since when they were embodied in the constitution they were made for ever a part of the supreme law of the land.

The present case is a most instructive illustration of the consequences of departing from the requirement of the common law and of the constitution of the United States, that an indictment by a grand jury shall precede a conviction for an infamous offence. When a mere information is once allowed, the result is seen in the present record. And it is to be remembered, that under the statutes of Vermont before cited, jurisdiction is given to any justice of the peace to take cognizance of a case like this, concurrently with the higher courts. So that such a magistrate, upon such an information by a town grand juror, has power to sentence a man to a fine of an indefinite and enormous

amount, and to an imprisonment longer than the period of his natural life. And this without any jury trial, unless it be by a jury of six men selected by a constable from the town where the trial is had. True, there is a right of appeal. But only upon giving bail to an amount that in such cases would be beyond ordinary means.

The case of O'Neil before cited, in which there was a conviction of three hundred and seven offences under a single count in an information of this sort, a fine of $6,638, and a sentence of imprisonment of fifty-four years, shows what may take place under these statutes.

In this connection the language of this Court as expressed by Mr. Justice Bradley, in *Boyd v. U. S., 116 U. S. Rep. 635*, is most pertinent, though referring to matters far less in importance than this:

"Illegitimate and unconstitutional practices get their first footing * * * by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the protection of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be "*obsta principiis.*"

IV. The objections to the information in this case, and to the proceedings upon it here presented, were sufficiently raised in the court below by the motion in arrest of judgment and the motion to quash.

In many of the cases heretofore cited, these objections were taken by such motions, and were held to be well taken.

And this Court so hold in *Rosen vs. U. S. supra* as well as in other cases.

1. The motion in arrest is very full and elaborate in stating the numerous points under the constitutional provisions into which the argument for the respondent was subdivided. This was unnecessary. It would have been quite enough, if it had contained only its fourth and fifth clauses, (*Record, p. 7*).

"Said Edward Hodgson, on said trial as appears by the record, was convicted of two infamous crimes without due process of law."

"Said Edward Hodgson, on said trial was denied by the State the equal protection of the laws."

The learned Judge who delivered the opinion in the record, intimates that the objection to the information might be regarded as cured by the verdict, as the court would presume that those facts not alleged that were necessary to a conviction might have been found by the jury. (*Record, p. 10.*) If the information was totally void as being in violation of the constitution of the United States, as this Court has repeatedly held, it is not easy to perceive what facts could have been found by the jury that would obviate that difficulty.

Nor was it ever the law that any defect of substance in an indictment was cured by verdict.

2. The motion to quash, also, sufficiently raises the questions though its language is more general. The report of the case in 66 Vt. Rep. shows that in the Supreme Court of Vermont such was the construction given by the counsel to its language, and such the right that was claimed under it.

Whenever the record shows that a man has been convicted without due process of law, and he claims the protection of the constitution and makes his claim understood by the court, and it is overruled by the court on its merits, he is not to be treated as having waived his rights because his language or that of his counsel is not precise, and "certain to a certain intent in every particular."

Indeed the true rule is that constitutional rights such as are here involved cannot be waived by an accused person, and that though he may have expressly waived, or omitted to assert them, and still before the final judgment is pronounced

claims the protection of the constitution and it is denied him, while the record shows that he was entitled to it, the judgment will be reversed by this Court on a writ of error.

"That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure on trial and in custody to object to unauthorized methods." Per Mr. Justice Harlan in *Hapt v. Utah, 110 U. S. Rep. 579.*

V. The federal questions in the case are sufficiently brought before this Court, by the assignments of error on which the writ of error was granted, (*Record, p. 22*), and by the further assigments in this Court. (*Record p. 26*).

The Supreme Court of Vermont intimates that the motion in arrest in that court might have been overruled because not filed in the court below. But they did not so decide, and expressly declined to do so, stating that if they did, they should remand the case to the County Court so that the motion could be filed there. And proceeded to dispose of the motion on its merits. The case is therefore not within the rule that excludes the jurisdiction of this court when the judgment appealed from was given on two grounds, either sufficient to support it, and one of which was non-federal.

But even if it had been held by that court that the motion was too late, the plaintiff in error would not have been deprived of his right to invoke the jurisdiction of this Court. It will be seen from the record that there was no judgment on the verdict and no sentence in the trial court, but the judgment was respited and sentence stayed. And that the judgment was rendered and the sentence imposed by the Supreme Court. In criminal cases where exceptions are allowed, the statutes of Vermont authorize that the judgment and sentence be stayed, to await the decision of the Supreme Court. And if the exceptions are overruled, that court alone has then the power to render judgment and pass sentence. (*Rev. Laws, Sec. 1699–*

1700.) How then can it be said that its jurisdiction was for that purpose appellate, or that the motion to arrest the judgment that it alone had then jurisdiction to render and did render, should have been made in a former court where judgment was not ren-rendered, and could not legally be rendered. Since the Supreme Court had the sole jurisdiction to render the judgment, they had the sole jurisdiction to arrest it. A motion in arrest of judgment is never too late in a criminal case, if made before the judgment is rendered and sentence pronounced, and in the court where that takes place.

1 Bishop C. P. (Ed. 1866) sec. 850-852.

And especially must this be true where the ground of the motion is that the judgment is void under the constitution of the United States.

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